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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 1078 90

THE TRUST COMPANY OF CHICAGO, ADMINISTRATOR OF THE ESTATE OF ELIZABETH PALMER SMITH, DECEASED, ET AL.,

Petitioners,

vs.

CITY OF CHICAGO, ET AL.,

Respondents.

Petition for Writ of Certiorari.

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To the Honorable Justices of the Supreme Court of the United States:

Petitioners, The Trust Company of Chicago, Administrator of the Estate of Elizabeth Palmer Smith, Deceased, Jason Paige, Executor of Estate of Carrie E. Paige, Deceased, and all other persons in like situation with reference to condemnation judgments against the City of Chicago, pray the issuance of a writ of certiorari to review the order of the Supreme Court of Illinois, rendered January 20, 1943 (Tr. 61) and adhered to March 9, 1943. Wherein on an appeal taken by your petitioners from the

Circuit Court of Cook County in Illinois, both of said courts ruled adversely upon and refused to consider the constitutional and federal questions which were properly stated and claimed and shown by the record and specially pleaded (Tr. 33-35: 67-77). The Circuit Court dismissed the complaints and the Supreme Court of Illinois transferred the appeal to the Appellate Court of Illinois, First District. That intermediate Appellate Court, under the Constitution and Statutes of Illinois, has no power to consider and pass upon constitutional questions. *Kowalczik* v. *Swift & Co.,* 317 Ill. 312; *People* v. *Davies,* 354 Ill. 168. The effect of said ruling and order of transfer by the Supreme Court of Illinois is to deny completely any forum whatever to appellants with reference to constitutional and federal questions which are presented by the record, and to erase all such questions from consideration by any court, other than on this review by Supreme Court of the United States. *Central Union Telephone Company* v. *City of Edwardsville,* 269 U. S. 190.

> "Appeals shall be taken directly to the Supreme Court in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved." Section 75, Chapter 110, Civil Practice Act of Illinois.

STATEMENT AS TO JURISDICTION.

The Supreme Court of Illinois filed no opinion. The order (Tr. 61-62) was made upon oral announcement by the Chief Justice at the time of oral argument in that Court, without recess to chambers and without consideration at conference by said Court.

Motion and suggestions by appellants were promptly made (Tr. 62-77) to reverse said final order. That motion summarized and restated the constitutional and fed-

eral questions that had been presented to the Circuit Court of Cook County and the Supreme Court of Illinois (Tr. 67-77). That motion to reconsider was denied March 9, 1943 by the Supreme Court of Illinois (Tr. 78). Timely application for review by this court is made on June 7, 1943. This petition is presented in accordance with Section 237 (b) of the Judicial Code as amended, and Rule 38 of this Court as amended.

The Circuit Court of Cook County has general jurisdiction of all matters at law and in equity (Tr. 34). The Supreme Court of Illinois has exclusive jurisdiction to review constitutional questions, pursuant to Section 75 of the Practice Act of Illinois, and Article 6, paragraph 11 of the Constitution of Illinois (Tr. 75).

Your petitioners urge that the Supreme Court of Illinois by its order without any opinion, abdicated its constitutional duty to your petitioners to review and pass upon the constitutional and federal questions presented by this record to the Circuit Court of Cook County and to the Supreme Court of Illinois. That in so doing said Court arbitrarily seeks to change the inalienable and fundamental personal and property rights of your petitioners under the bill of rights of the Constitutions of the State of Illinois and the United States, into mere matters at the grace and permission of the Supreme Court of Illinois (Tr. 74-76). Also to change the obligatory jurisdiction of the Supreme Court of Illinois into merely discretionary jurisdiction. Thereby your petitioners were denied an obligatory hearing as to their vested rights, their contractual rights, and equal application of law, contrary to the fifth and fourteenth amendments of the Constitution of the United States. *People* v. *Kelly*, 361 Ill. 54 at 59, 60.

SUMMARY OF THE MATTER INVOLVED.

Elizabeth Palmer Smith filed in the Circuit Court of Cook County, her petition (Tr. 1) for writ of mandamus on October 23, 1933, to collect the balance of a condemnation judgment, entered in a local improvement proceeding in the County Court of Cook County, on June 2, 1922. The City of Chicago and necessary officials were named as respondents to that petition (Tr. 5), and they remain the defendants to this suit at the present time. The respondents, by their counsel, filed a general demurrer on November 30, 1933, which was argued on many occasions in the Circuit Court of Cook County (Tr. 8). In January 1934, respondents asked leave to withdraw the demurrer, and were given leave to file an answer, and later certain amendments to that answer. The plaintiff filed motions to strike the answer and the amendments. Those motions were argued on various occasions, before the Circuit Court of Cook County, but no order was entered.

On May 20, 1940, respondents sought leave to withdraw all their answers and defenses, and to file a motion to dismiss the suit upon the sole ground that some statute of limitation had run against the suit (Tr. 8). An affidavit was filed in support of that motion, and the plaintiff filed a counter-affidavit (Tr. 9). The petition for mandamus and that counter-affidavit present facts and issues which are substantially the same as those set forth by the separate count in chancery as hereinafter stated. To unify and simplify the petition we discuss the case in detail as stated by the count in chancery, below at page 7 ff.

In October 1941, Elizabeth Palmer Smith died, and the Trust Company of Chicago, as Administrator of her estate, was substituted as plaintiff, by order of court on November 12, 1941 (Tr. 9). On that date the respondents asked

leave to file an additional affidavit in support of their motion to dismiss (Tr. 12). The Trust Company of Chicago, as Administrator, filed a counter-affidavit and a motion to strike the motion of the defendants to dismiss, and to strike the affidavits in support of the motion by the defendants to dismiss (Tr. 9). These matters were briefed and argued, and the Circuit Court on January 12, 1942 overruled the motions made by the plaintiff, and sustained the motion made by the defendants to strike the complaint for mandamus, but gave leave for your petitioners to file a separate count in chancery within 10 days, and ruled that respondents answer within 10 days (Tr. 14).

Complaint in Chancery in Circuit Court.

The separate count in chancery (Tr. 15 ff) was filed on January 20, 1942 pursuant to the order of the court; as a class suit with the Trust Company of Chicago, as Administrator, one named plaintiff, and Jason Paige, Executor of the Estate of Carrie E. Paige, deceased, as another named plaintiff; and all other persons in like situation with reference to condemnation judgments against the City of Chicago, as additional plaintiffs. To this additional count in chancery, the respondents filed a new motion to dismiss the entire suit (Tr. 56). That motion was briefed and argued, and the suit was dismissed by final order April 21, 1942 (Tr. 56), by the Circuit Court of Cook County.

The facts of the case appear in the pleadings, and such of said affidavits as this court may determine to be material. No evidence was heard by the Circuit Court. All orders were entered by the motion judge. No written opinion has been filed.

On February 2, 1942, the plaintiffs filed a motion in writing in said Circuit Court, seeking relief *pendente lite*

pursuant to the complaint in chancery and the prayers thereof. By order of that date the motion was entered and continued (Tr. 54). That motion was denied also by the final order of Circuit Court on April 21, 1942 (Tr. 56) mentioned above at page 5.

From that final order this appeal was taken direct to Supreme Court of Illinois by notice filed June 30, 1942 (Tr. 57). The record was filed in that court on appeal August 28, 1942. The order of transfer (Tr. 61) by that court to the Appellate Court for the first district of Illinois, confirms that an effective appeal was taken in due time free from objection as to form and pursuant to statute.

The Basic Issue Before Illinois Courts.

The main question in this case before the Supreme Court of Illinois was the construction of article 2, section 13 as to just compensation, and article 9, section 12 as to prior provision for payment before municipal debt incurred, and article 6, section 12 as to powers and duties of Circuit Courts over trusts in chancery, and related provisions of the Constitution of the State of Illinois; as applied to the trust for purchase money determined by condemnation proceedings; and as asserted by pleadings for plaintiffs in this suit.

These constitutional questions were raised by the pleadings before the Circuit Court, were submitted to the trial judge, were ruled upon, and the adverse ruling was preserved for review in this record and duly presented to the Supreme Court of Illinois (Tr. 68).

By direct appeal to that Court your petitioners sought to obtain from that Court, the construction and application of specific provisions of the Constitution, to the situation where purchase money awards by condemnation judg-

ment were not paid promptly; but where, after a substantial period of delay, there is paid at most a sum equal to the original amount of the award, without the accrual of interest which arises automatically by passage of time under the judgment act (Section 7 of Chapter 77) and other statutes (Section 2 of Chapter 74) of the State of Illinois, and under the just compensation provisions and said other provisions of the Constitution of Illinois (Tr. 34). Your petitioners say that said provisions by statute and constitution have enlarged during the period of delay the amount of money secured by condemnation judgment lien and constitutional lien in favor of each property owner. *Jacobs* v. *United States*, 290 U. S. 13 at 16.

That reserved constitutional issue in this record, stated by both law and chancery procedure, raised substantial constitutional questions on review before the Supreme Court of Illinois, some of which it had never passed upon. That basis for liquidation of condemnation judgment by this record was presented for the first time to the Supreme Court of Illinois, in the form of a class suit in chancery, asserting in this record that there can be no satisfaction under the constitutional and statutory provisions, until both the accrued interest first, and the original amount of the judgment thereafter, have been paid in full to property owner, for land taken by eminent domain proceedings.

Basic Facts Stated by the Pleadings.

Paragraph (1) of the separate complaint in chancery filed by permission of the court, reads as follows:

> "The plaintiffs herein, were the owners of the real estate situated in the City of Chicago, condemned in part and damaged as to remainder of such parcel, by proceedings for condemnation, and thereby taken from the plaintiffs by force against their wills, but sub-

ject to duties of City of Chicago to pay just compensation, as provided by sovereign constitutions and statutes, which were made for the protection of plaintiffs: all as hereinafter more fully stated" (Tr. 15).

Paragraph (2) names the defendants and their several official titles, and states:

"All of said persons respectively and their successors in office, are *ex officio* active express trustees, of powers duties and funds, which are held by them for the plaintiffs, by reason of the facts hereinafter stated" (Tr. 16).

Paragraph (3) states that the plaintiffs bring this suit against the defendants so named (Tr. 16).

Paragraph (4) asserts that designated portions of the Constitutions of the State of Illinois and of the United States, are the basic rights giving rise to the duties of the defendants as trustees for the plaintiffs (Tr. 17).

Paragraph (5) relies upon specific portions of the Act concerning local improvements and other portions of the statutes as confirming fiduciary powers with which the defendants were and are vested for the benefit of plaintiffs (Tr. 17).

Paragraph (6) recites that the defendants being so vested with basic constitutional and statutory powers in trust, voluntarily undertook to exercise the same by the condemnation proceedings designated in this suit (Tr. 18).

Paragraphs (7) and (8) are as follows:

"(7) Many other like proceedings, and court judgments in condemnation, under Local Improvement Act or Eminent Domain Act, in favor of groups of persons, which include all other plaintiffs, and against defendant City of Chicago, for local improvement and

other purposes, were entered at the suit of the defendants in the County Court, the Circuit Court and the Superior Court of Cook County, after July first 1897, and before the filing of this complaint, as shown by the records of said courts, and further shown by a memorandum thereof, to be filed in this cause as an integral part of this complaint, pursuant to prayer (i) of this complaint. All of said proceedings are entered also upon the dockets and files of the City of Chicago and are well known to the defendants" (Tr. 19).

"(8) Defendants by their own voluntary acts, elected to have said courts enter the judgments of condemnation, which confirm awards of money to the plaintiffs, and against defendant City of Chicago personally and individually, in each and all of the suits for condemnation herein mentioned. Each judgment is personal and individual against the City of Chicago. None of said judgments was ever reversed or modified. Said judgments became and remain final and unconditional, as required by the constitution and as provided by Statute. The amount of each judgment as entered, became instantly a capital liability and obligation of said trust, under the constitution as hereinafter stated. Thereby said fiduciary and trust relationship became irrevocable, until payment to each plaintiff herein shall be fully made, with interest, costs and counsel fees as hereinafter stated" (Tr. 20).

Paragraph (9) says that upon the entry of the judgments in condemnation, plaintiffs became vested with unconditional rights to receive the compensation awarded, and

"Thereby the full faith and credit of the City of Chicago, was pledged and assigned in trust irrevocably, to secure and assure such payment, to each of present plaintiffs" (Tr. 21).

Paragraph (10) reads as follows:

> "These vested rights of the City of Chicago and the present plaintiffs, are reciprocal, correlative, and inseparable. From and after the entry of judgment in condemnation, the City of Chicago thereby was adjudged liable to perform all fiduciary duties, which it had accepted and assumed as herein stated, and was adjudged to hold in its control and possession, the just compensation and interest accruing thereon, in an active express trust for the sole beneficial use of each plaintiff respectively, until each shall be fully paid as herein demanded" (Tr. 21).

Paragraph (11) recites further steps in the condemnation proceedings, and the completion of all of the improvements (Tr. 22).

Paragraph (12) states the account between the defendants, and Trust Company of Chicago as Administrator of the estate of Elizabeth Palmer Smith, one of the plaintiffs. This account shows

> "Net balance of principal of judgment unpaid, Two Thousand Eight Hundred Nineteen and 57/100 ($2,819.57) Dollars, remaining due October 10, 1927 on the judgment."

and interest thereon to be computed (Tr. 22).

Paragraph (13) shows a like accounting against the defendants, and in favor of the Executor of the Estate of Carrie E. Paige, deceased, one of the plaintiffs:

> "Net balance of principal unpaid, Four Thousand Four and 62/100 ($4,004.62) Dollars, remaining due February 1, 1927 on the judgment."

and interest thereon to be computed (Tr. 23).

Paragraph (14) recites similar accountings for substantial sums of monies due from the defendants to each of

the plaintiffs by reason of unsatisfied condemnation judgments (Tr. 24).

Paragraph (15) states that all these monies due to the plaintiffs from the defendants, are due as part of the trusts established by the constitutions. It reads as follows:

> "*Trust to Pay Plaintiffs Pursuant to constitution.*
>
> "Said City of Chicago and said officials *ex officio*, as active express trustees, at all times herein concerned were so seized, vested and possessed of said enabling powers, and had accepted and assumed complementary duties, under said bills of rights, constitution and statutes in trust, that the named plaintiffs and all other persons in like situation, whose land was taken in part and damaged as to remainder of parcels, for said Local Improvements, shall be paid pursuant to enabling statutes, and pursuant to said judgments of condemnation, and pursuant to all statutes now in force concerning local improvements, and pursuant to the duties of active express trustees, according to the course of equity by the common law, which is preserved intact by Section 12 of Article 6 of the Constitution of the State of Illinois, and confirmed by many decisions of the Supreme Court of Illinois" (Tr. 24).

Paragraph (16) recites that defendants as trustees, in partial exercise of their trust duties, created the special assessment trust fund, which is described in the mandamus petition filed October 23, 1933, in this cause (Tr. 24 and 4).

Paragraph (17) recites that under section 22-13 of the Cities and Villages Act, the respondents have in charge an additional trust fund therein described, which is applicable to payment of balances due the plaintiff on their judgments (Tr. 25).

Paragraph (18) states that by section 22-14 of the Cities and Villages Act, interest accrued on judgments shall be paid when any principal is paid, and recites that Section 7, Chapter 77 (which is the judgment act) provides for interest at the rate of six per cent per annum, from the date of the recovery of any judgment "until the same is paid" (Tr. 26).

Paragraph (18) continues by declaring that the effect of the constitutions and statutes is to deprive the respondents of any discretion as to payment of interest; that it was and is the peremptory duty of the defendants to pay all interest that has accrued, before any sum could be credited on the principal of any condemnation judgment (Tr. 26).

Paragraph (19) recites the rulings made by Supreme Court of Illinois, and asserts that any failure to pay and credit interest before principal, would be a departure from the powers of the defendants, and wrongful departure from their trust duties (Tr. 27).

Paragraph (20) asserts wilful delays by the defendants for many years in making the payments, and asserts the inadequacy of the legal remedies as an important reason for this class suit in equity (Tr. 28).

Paragraph (21) asserts that by reason of the constitutional provisions, and the facts stated in the complaint, plaintiffs have a first and prior lien, as of the dates of the judgments, upon all available funds and property of the City of Chicago (Tr. 29).

Paragraph (22) reads as follows:

> "Also at all times herein concerned, the defendants by undertaking such trust relation as active express trustees, had accepted and assumed an affirmative duty to act in good faith, to make a faithful disclosure, frequent account, full discovery and accurate report

to the plaintiffs, with reference to all duties and obligations herein mentioned, of the City of Chicago and said official *ex officio*, as express trustees, including the prompt payment of interest as a part of just compensation, and with reference to what were and are, all the funds and property available to pay said principal, interest and just compensation to the plaintiffs" (Tr. 29).

Paragraph (23) shows in detail, the violations by defendants of their duties as such trustees, and their wilful attempts to defeat the vested and constitutional rights of the plaintiffs (Tr. 30).

Paragraph (24) sets forth acts of duress and other misconduct by the plaintiffs (Tr. 30).

Paragraph (25) shows that these acts and duress were so severe as to amount to fraud on the plaintiffs, and against their financial rights (Tr. 31).

Paragraph (26) shows that the releases, deeds and other vouchers, which the defendants coerced from some of the plaintiffs, are void and fraudulent and to be disregarded by this court of equity (Tr. 32).

Paragraph (27) refers to Section 22-15 to 20 of the Cities and Villages Act, as establishing additional $12,000,000 fund applicable to the payment of monies due to the plaintiffs (Tr. 32).

Paragraph (28) recites in detail the constitutional provisions which are relied upon by paragraph (4), and concludes as follows:

"The language of the constitution is peremptory, that the municipal authorities shall, before or at the time of incurring condemnation indebtedness, provide for the collection of a direct annual tax, sufficient to pay the interest and principal, of all just compensation

> indebtedness with interest and costs. That duty is paramount to all other duties. The municipal body is not authorized to apply to such purpose, only the money that may remain after paying other expenses, or after discharge of other appropriations. The City is commanded to liquidate entirely all judgments for just compensation, ahead of and prior to payment of any other judgments, or any other obligations or expenses whatsoever. All of said provisions of the Constitution of Illinois are self-executing, and are written into all proceedings and statutes affecting local improvements. To provide and pay the money is an irrevocable duty, which has been accepted and assumed by the defendants voluntarily. That constitutional duty is a continuing one, until full performance shall occur" (Tr. 33).

Paragraphs 29, 30, 31 and 32 set forth the history of this suit prior to the filing of count in chancery (Tr. 35-37).

Paragraph (33) shows that the failures by the defendants, as active express trustees, to pay the plaintiffs, is long continued and wilful, and renders the City of Chicago personally liable to pay the plaintiffs (Tr. 37).

Paragraphs 34, 35, 36, 37, 38, 39 and 40 recite further details of wrongful administration of the trusts by the defendants (Tr. 38-42).

Paragraph (41) shows that the defendants are presumed as matter of law, to have in hand the funds and monies sufficient to liquidate the claims of the defendants (Tr. 42).

Paragraphs (42) and (43) state in detail that this is a proper class suit. Those paragraphs read as follows:

> "By reason of events hereinabove stated, it has become necessary, and the plaintiffs have instituted and are maintaining this suit, on behalf of themselves

and on behalf of all other property owners herein mentioned, and on behalf of all property owners who have condemnation judgments as above mentioned, in any part unpaid. All such persons are made parties plaintiff as a class by description. The objects of the suit and the questions arising, are of common and general interest to all concerned. Said trust beneficiaries are numerous and constitute hundreds of former property owners, who are condemnation money judgment creditors, there being scores of properties condemned and hundreds of owners. They constitute a class so numerous as to make it impracticable, to bring them all by name at this time before this court. Their names and residences cannot be ascertained without great difficulty and delay. In some condemnation orders so obtained by the defendants, the plaintiffs were not named, but were described as 'owners.' The named plaintiffs fairly represent the interests of all herein. Wherefore the active plaintiffs are suing in behalf of all such persons who are plaintiffs by description" (Tr. 42).

"The named plaintiffs, and all other said former owners of real estate, which has been damaged or taken by condemnation, who are made plaintiffs as a class by description, have a common like and pro rata interest, in the subject matter of this suit, and to the funds composed from collections by the City of Chicago, which are herein described and drawn into court. Plaintiffs' rights are not antagonistic or adverse to each other. All of the plaintiffs are beneficiaries of said active express trust powers, trust duties and trust funds. All plaintiffs are entitled to share therein pro rata, and in proportion as their interests herein shall appear. There exists a common right sought to be enforced in this cause. The named plaintiffs undertake to represent the rights, of all such property own-

ers who now are beneficial owners, and to maintain and conduct, this suit as a representative class suit, for the benefit of themselves and all said former owners of real estate condemned. The named plaintiffs, invite all members of the class to appear in this action, and to make contribution by pro rata share, toward the costs and expenses of the same" (Tr. 43).

Paragraphs (49) and (50) (Tr. 47), are as follows:

"The active express duties of defendants, to levy assemble and distribute to the plaintiffs said trust funds, are so primary and so firmly established by said sections of the constitutions, that all power is withheld from the legislature, to make any statute of limitation applicable, to any facts or transactions mentioned in this complaint. In the alternative the plaintiffs say, that no facts or circumstances exist or have occurred, which are sufficient to start the running, of any statute of limitations, which the defendants might claim to be applicable to this suit."

"Any refusal by this court to give relief, to the plaintiffs as herein demanded and prayed, would be departure from the law of the land, and a denial of property and procedural rights, which are vested in the plaintiffs as stated in this complaint, and would be a denial to each of them, of due process under the constitutions and the decisions, which are hereinabove asserted for the protection of the plaintiffs."

Prayers for Relief in Complaint in Chancery.

Paragraph (51) are the prayers for relief (Tr. 48 ff.) including discovery, accounting and orders for payment of the sums found due to the plaintiffs, with appropriate attorneys' fees and costs, to be paid to the plaintiffs out of the funds mentioned in the complaint or to be pro-

vided in response thereto, and pursuant to the provisions of the constitutions (Tr. 48-53).

The record also includes a separate count making the same claim by petition for writ of mandamus. Of that pleading both the Circuit Court of Cook County (Tr. 34), and the Supreme Court of Illinois (Article 6, Section 2) have original jurisdiction by direct provision of the Constitution of Illinois.

Errors Relied Upon for Reversal in the Supreme Court of Illinois.

Appellants insisted before the Supreme Court of Illinois, "that the Circuit Court erred in striking the petition for mandamus; and erred in striking the count or complaint in chancery; and erred in dismissing the suit; and erred in sustaining each of the motions for the defendants; and erred in overruling the motions made by the plaintiffs; and erred in denying to plaintiffs relief asked for *pendente lite*, and erred in failing to rule that the default should be entered against the defendants on the petition for mandamus; and erred in failing to rule that the defendants must answer the count or complaint in chancery; and by each of said orders the court erred by denying to appellants their constitutional rights specifically demanded and set forth in this record, by both the petition for mandamus and the complaint in chancery." The constitutional reasons why said orders and rulings by the trial judge should be reversed were stated in the argument and briefs and the motion to reconsider (Tr. 67 to 77) in the Supreme Court of Illinois, and are renewed by this petition before this Court.

The Theory of Appellants in the Supreme Court of Illinois.

Condemnation proceedings provide a means of making a contract upon the court record for the purchase of real estate from an unwilling owner. All usual principles of equity and of chancery procedure which govern in ordinary sales of real estate, apply in the liquidation of that contract. Petitioners say that the judgment order is the signing of that contract, that the prior proceedings and the constitutional provisions are the terms of the contract. The seller and purchaser of real estate are trustees for each other in contracts off the court record, from the time that the contract is signed until it has been fully performed. Petitioners say that the same is true when purchase is made by condemnation, from the time when the judgment becomes final. The condemnor as purchaser of real estate is trustee for the purchase price from the date of such judgment until payment in full with interest has been made to the property owner. *Finn* v. *Wetmore*, 212 Ill. App. 550 at 553 and 554 and cases there cited.

The Supreme Court of Illinois has said in *Feldman* v. *City of Chicago*, 363 Ill. 247, 249 (assumpsit upon condemnation judgment):

> "The claim here was for a sum certain, depending only upon computation. Demand for interest was made at the time the judgment was paid. The amount of compensation was fixed by the judgment and the rate of interest was fixed by the Interest Act. No dispute could arise between the city and the property owner as to the amount to be paid, after the judgment became final and unconditional."

By section 32 of the Local Improvement Act of Illinois (Chapter 24:84-32), the duty to pay the purchase price is unconditional from and after date when the judgment

becomes final. Thereafter "no dispute could arise between the city and the property owners as to the amount to be paid." Petitioners say that by said provisions of the constitution, and by Section 1 of the Eminent Domain Act (Chapter 47), and by Section 30 of said Local Improvement Act, the taking does not become lawful and sufficient until payment has been fully made. It follows that all usual remedies by mandamus and in chancery are available to the property owner, as of course until his selling price with accruing interest, as determined by the judgment order and the Constitutions has been fully paid.

After printed briefs had been filed in the Supreme Court of Illinois, the case was reached for oral argument on January 20, 1943. The presiding Justice refused to permit a discussion on the merits of the appeal, but limited the argument to jurisdictional constitutional features. By oral announcement the appeal was disposed of at once without recess, and before passing to oral argument of the next case (Tr. 61). On the following day petitioners sought to file motion to reconsider, but were prevented by the sudden closure of the Court without any prior announcements. After some difficulty (Tr. 65-67) that motion with suggestions was filed, and was disposed of adversely to petitioners at the next term of Supreme Court of Illinois on March 9, 1943 (Tr. 78).

The Main Questions Presented by this Petition.

Whether obligatory jurisdiction may be evaded and renounced by Illinois Courts, under our constitutional system of government.

Constitution of United States, Art. VI, paragraph 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and

all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Whether the Illinois Courts by renouncing obligatory jurisdiction with which they are vested by the Constitutions, can thereby evade ruling upon the record as to constitutional matters presented to them by your petitioners, so that thereby your petitioners have been denied their property and freedom under the bills of rights.

Foregoing primary questions may be restated as follows:

Whether the Supreme Court of Illinois has choice to ignore and violate the bills of rights of the Constitutions of the United States and of Illinois, by its failure to provide clear and explicit rules governing proceedings before that court, particularly as to the manner of stating jurisdiction where constitutional questions are involved. Under the prevailing practice, that court has assumed the position that in ruling upon a case before it, it has power and discretion to decide or not to decide whether a constitutional question is involved. Litigants are thus deprived of their rights in that that court claims it may, (as in this case) merely transfer the case to the Appellate Court of Illinois without any opinion. Such practice results in a practical blockade of review by the United States Supreme Court, from such an order.

(Rules of Supreme Court of Illinois are printed in full form by Smith Hurd Illinois annotated Statutes, Chapter 110, Sections 259.1 to 259.71.)

Whether the Supreme Court of Illinois may debase the bill of rights and other provisions of the Constitution of Illinois into a bill of their discretions, by their varying and unpredictable manner of administration of Sections

75 and 86 of Illinois Civil Practice Act. Those sections read in part as follows:

> "Appeals *shall* be taken directly to the Supreme Court in *all cases in which* a franchise or freehold or the validity of a statute or *a construction of the constitution is involved.*" Section 75.
>
> "Where an appeal is taken to either the Supreme or Appellate Court and it is found or adjudged that the case was wrongly appealed to such court, it shall be the duty of such court to direct the clerk to transmit the transcript and all files therein with the order of transfer to the clerk of the proper court. On the receipt of such record the clerk shall at once file the same and the case shall then proceed as if the same had been taken there from the inferior court." Section 86.

In some transfers to Appellate Court, opinions are written, (a recent example is *Rittenberg* v. *Murmingham*, 381 Ill. 267), in others there is only the order, as in this record (R. 78). The absence of opinion attempts to blockade review by this court, and leaves indefinite what proceedings are intended to be conducted before the Appellate Court.

Whether the Circuit Court of Cook County and the Supreme Court of Illinois may disregard and deny to petitioners equal protection of the law, which had been announced and settled by at least five decisions of the Supreme Court of Illinois, prior to the time the suit at Bar was prepared and demand was made on October 20, 1933 (Tr. 77). Those decisions require reversal at bar.

Whether the Supreme Court of Illinois may deny to petitioners equal protection of the law, by its cryptic order and its failure to prepare and file an opinion, contrary to what it does in most cases where an order of transfer is made to the Appellate Court; thereby making

difficult by adverse judicial administration, the path of your petitioners to the Supreme Court of the United States.

Whether the Supreme Court of Illinois may deny to your petitioners equal protection of the law, by refusing any writ for enforcement of the judgment against a municipal body except by arbitrary discretion of the Supreme Court of Illinois (Tr. 74-76), whereas as against all other judgment defendants, writs of execution upon judgments issue in all courts of Illinois as of course, from the office of Clerk in every court. Compare current ruling on *scire facias* after judgment: *Bank of Edwardsville* v. *Raffaele,* 381 Ill. 486 at 487.

Whether the Supreme Court of Illinois may enforce provisions of the Constitution of Illinois with reference to recovery for property taken by condemnation by some litigants (*People ex rel. Louis Markgraff, et al., Appellees* v. *Rosenfield Director, Appellant,* No. 27083, 383 Ill. .....; *People* v. *Kelly,* 361 Ill. 54 at 59, 60) and arbitrarily refuse like relief to your petitioners (Tr. 67-76).

Whether the Supreme Court of Illinois, by any and all said action adverse to petitioners, may deny to them due process of law contrary to Section I, Amendment 14 of the Constitution of the United States.

Where as here the appeal is taken upon constitutional grounds, there exists no rule by the Supreme Court of Illinois as to manner for stating its jurisdiction. Standing rules of that court do not require specific mention in the briefs before that court, as to the matter of jurisdiction. The question of jurisdiction may arise orally or on motion before that court.

In the case at bar the respondents made no motion as to jurisdiction on this appeal, but filed a printed brief upon the merits of the case. There was no issue as to

jurisdiction before the Supreme Court of Illinois. That court made no special ruling for your petitioners to show cause in that court upon the matter of jurisdiction. The order does not say that that court acted upon its own motion. The order of transfer has no basis in the record. The order is merely arbitrary. That court of record proceeded orally. The failure by the Supreme Court of Illinois to provide clearly by rules governing proceedings before that court, as to manner of stating jurisdiction where constitutional questions are involved, results in uncertainty which that court uses to hear and decide, or not to hear or decide, a case presented, merely as a matter of grace and arbitrary discretion (Tr. 61).

Sometimes the Supreme Court of Illinois accepts and decides a case although no constitutional question or other matter for jurisdiction appears in the briefs or the opinion by that court. This occurred by rehearing denied March 11, 1943 (two days after said court refused to reconsider this case). That opinion is the case of *Wennerholm* v. *Wennerholm,* 382 Ill. 254. That (like the case at bar) was a trust fiduciary case.

While the Supreme Court of Illinois in recent years has fulminated against constitutional questions coming to that court, its remarks appear by opinions in many reports, nowhere stated in unit form, and never adhered to with any consistency or continuity by that court. The only clear principle which that court has stated is that jurisdiction vests in that court where the question is "so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue." *Winkelman* v. *Winkelman,* 345 Ill. 566 at 568. The pleadings do that in the record at bar. The briefs in the Supreme Court of Illinois carefully discussed those same federal and constitutional matters.

Prayer for Relief on This Petition.

Your petitioners submit that they did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Supreme Court of Illinois was such as to call for review and reversal by the Supreme Court of the United States.

WHEREFORE, petitioners pray the allowance of a writ of certiorari to the Supreme Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein by said Supreme Court of Illinois may be reversed, and for such relief as this Court may direct.

WEIGHTSTILL WOODS,
Attorney for Petitioners.

BENJAMIN F. LANGWORTHY,
LAWRENCE C. MILLS,
HORACE RUSSELL,
Of Counsel.

SUPPORTING BRIEF.

A.

A-1) The primary duty is obligatory upon all courts, both state and national, to hear and determine assertions upon the Bill of Rights and other constitutional questions and federal questions, which are presented by the record.

Article VI of the Constitution of the United States, (Second Paragraph).

West Chicago Street Railway Co. v. *Illinois ex. rel. Chicago,* 201 U. S. 506 at 519-520.

Coombes v. *Getz,* 285 U. S. 434.

A-2) The order of January 20th as adhered to on March 9, 1943 by the Supreme Court of Illinois, is final for purposes of review by this Court.

Central Union Telephone Company v. *City of Edwardsville,* 269 U. S. 190.

Largent v. *State of Texas,* 63 S. Ct. 667, 668.

Jamison v. *State of Texas,* 63 S. Ct. 669, 671.

Wright v. *Risser,* 378 Ill. 72, 379 Ill. 539.

A-3) The cryptic manner of order used by the Supreme Court of Illinois to dispose of the constitutional questions (Tr. 61), does not prevent this Court from exercising its power to review the denial of said constitutional and federal rights to your petitioners.

Martin v. *City of Struthers, Ohio,* 63 S. Ct. 862, 863, Footnote 2.

Amendment 14, Section 1 of the Constitution of the United States.

B.

The Supreme Court of Illinois so vested with obligatory jurisdiction to hear and determine this direct appeal because of constitutional questions presented by this record, has been arbitrary and inconsistent and has denied to your petitioners an equal application of the law, by the entry of its said order. These are cases where that Court has exercised jurisdiction on direct appeal to decide constitutional and trust questions. They involve fiduciary and trust situations:

Winkelman v. *City of Chicago,* 213 Ill. 360 at 362.
Babcock v. *Chicago Railways,* 325 Ill. 16.
Crozier v. *Freeman Coal Mining Co.,* 363 Ill. 362 at 387.
Cohen v. *City of Chicago,* 377 Ill. 221, 230.
Rittenberg v. *Murmingham,* 381 Ill. 267 at 273.
Amendment 14, Section 1 of the Constitution of the United States.

C.

C-1) Writ of mandamus to compel payment of a judgment against City is not a new suit but is a writ in aid of jurisdiction previously attached and becomes indispensable substitute for execution to enforce judgment.

U. S. v. *Council of Keokuk,* 73 U. S. 518.
People v. *Kelly,* 361 Ill. 54 at 59, 60.
Bank of Edwardsville v. *Raffaele,* 381 Ill. 486.

C-2) A City and its officers can have no higher duty than the payment of an honest condemnation debt reduced to judgment, and it is not discretionary with its officers whether or not they shall do so.

People ex rel Farwell v. *Kelly,* 367 Ill. 616 at 619.
People ex rel Mercantile National Bank of Chicago v. *City of Chicago,* 377 Ill. 573.

The People v. *Allied Hotels Corporation,* 381 Ill. 544.

People ex rel Wanless v. *City of Chicago,* 378 Ill. 453.

People ex rel Chicago Title and Trust Co. v. *Village of Glencoe,* 372 Ill. 280.

People ex rel Baird & Warner v. *Lindheimer,* 370 Ill. 424.

Supervisors of Coles County v. *People,* 226 Ill. 576.

People ex rel Farwell v. *Kelly,* 361 Ill. 54.

People ex rel Anderson v. *Village of Bradley,* 361 Ill. 301.

People ex rel Wieboldt Stores v. *City of Chicago,* 368 Ill. 421.

Town of Cicero v. *People,* 105 Ill. App. 106.

C-3) The constitutional provisions asserted by this suit as sources and confirmation of the trust are mandatory and are self-executing without legislation.

People ex rel Markgraff v. *Rosenfield, Director of Public Works and Buildings,* 383 Ill. .....

People v. *Smith,* 374 Ill. 286.

People v. *Kelly, Mayor,* 361 Ill. 54 at 59, 60.

People v. *City of Chicago,* 378 Ill. 453 at 458.

C-4) The refusal by the Supreme Court of Illinois to hear and pass upon the constitutional matters presented to them by this record was an arbitrary abdication from Judicial duty.

Motion to Reconsider (Tr. 67-77).

D.

This suit is based upon a trust in writing established pursuant to and under the protection of the Constitution of Illinois.

D-1) By the Constitution of Illinois the City is required to provide in advance for the fund to pay the purchase price and interest, before it becomes indebted by condemnation land purchase proceedings.

People v. *New York Central Lines,* 381 Ill. 490.
People ex rel Markgraff v. *Rosenfield, Director of Public Works and Buildings,* 383 Ill. .....
Section 12 of article IX of Constitution 1870.
Kane v. *City of Charleston,* 161 Ill. 179 at 183.
East St. Louis v. *Amy,* 120 U. S. 600 at 603 ff.

D-2) By section 13 of article 2 of the Constitution of Illinois, which provides for just compensation for real estate that is purchased by condemnation, there remains vested in each condemnee, a vendor's lien, to secure the purchase money awarded by the condemnation judgment, until just compensation has been fully made to the property owner. The meaning of the Constitution is that purchase price award and accruing interest, are held in trust by the City to accomplish full satisfaction to the property owner.

Chicago & E. I. R. Co. v. *Hay,* 119 Ill. 493 at 502.
People v. *Smith,* 374 Ill. 286 at 288.
The People ex rel Wanless v. *City of Chicago,* 378 Ill. 453 at 458.
Lewis v. *Hawkins,* 90 U. S. 119.
Pomeroy 5th Ed. Equity Jur. Sec. 1250 pages 738, 749.
City of Chicago v. *Collin,* 302 Ill. 270 at 275.

Village of Lansing v. *Sundstrom*, 379 Ill. 121 at 125.

Potter's Dwarris on Statutes and Constitutions at page 387.

Eldridge Drainage and Sewer District v. *Wilcoxson*, 365 Ill. 249 at 251.

Tiffany on Real Property, 3rd Edition (1939), Section 683.

D-3) Accruing interest is part of the just compensation purchase price provided for by the constitution.

Jacobs v. *United States*, 290 U. S. 13 at 16.

Roach v. *Village of Winnetka*, 366 Ill. 578 at 586.

Mecartney v. *City of Chicago*, 273 Ill. 276 at 281 and 284.

City of Chicago v. *1111 LaSalle Building Corporation*, 316 Ill. App. 66.

Norfolk and Western Ry. Co. v. *Board of Education of the City of Chicago*, 114 Fed. (2d) 859 at 862.

Dooley v. *Stipp*, 26 Ill. 86 at 89.

Seaboard v. *U. S.*, 261 U. S. 299.

Brown v. *U. S.*, 263 U. S. 78, 86.

Kieselback v. *Commissioner of Internal Revenue*, 63 S. Ct. 303.

D-4) After judgment on condemnation award becomes final, by Illinois law and the constitution, the municipality is trustee of the accruing interest and the amount of judgment award, until both are fully paid. By the constitution, by the statute and by its voluntary undertaking, the City remains trustee to provide and collect and disburse all funds specified by the pleading of plaintiffs in this record.

Section 13 of Article 2 of Constitution of Illinois.

Section 1 of Eminent Domain Act.

Sections 30 and 32 of Local Improvement Act.

Village of Lansing v. *Sundstrom*, 379 Ill. 121 at 123.

How & Company v. *City of Chicago*, 306 Ill. App. 571.

City of Jacksonville v. *Bankers Life Co.*, 90 F. 2d 141 at 144.

D-5) The liens set up by the Constitution and by the Local Improvement law, to secure payment of purchase price, and the mandatory powers with which the defendants are invested in relation thereto, to be exercised for benefit of these plaintiffs, are made unconditional by said provisions of the State and National Constitutions. They become enforcible and irrevocable upon entry of condemnation judgments. These liens and powers are held by the defendants as trustees, to secure purchase money debts remaining due to the plaintiffs as condemnees. The purchase price award and accruing interest, are held in trust by the City to accomplish full satisfaction to the property owner. These liens and powers and all funds arising therefrom, are shown by this record to be trust res, which this court of equity will administer for the benefit of plaintiffs, until the mandate of just compensation under both the Illinois and National Constitutions, has been fully satisfied by payment of principal and interest, upon the condemnation judgments which are asserted by this record.

Village of Lansing v. *Sundstrom*, 379 Ill. 121 at 125.

Tiffany on Real Property, 3rd Edition (1939), sec. 683.

People ex rel Wanless v. *City of Chicago*, 378 Ill. 453, 459.

City of Chicago v. *McCausland*, 379 Ill. 602 at 606, 607.

Irving Trust Co. v. *Day*, 62 S.C.R. 398 at 401, 314 U. S. 556.

Village of Brookfield v. *Pentis*, 101 Fed. (2d) 516, 521.

Pomeroy on Equity Jur., 5th Edition (1941), secs. 1060, 1160, 1164, 1167.

Perry on Trusts, Vol. II, Sec. 823, p. 1468. (Seventh Edition 1929.)

Duncan v. *Thompson*, 315 U. S. 1.

D-6) The defendants are voluntary active trustees of an express trust, assumed by them wilfully, with all obligations incident to private contract and trust relationship. The trust is evidenced by provisions of the Constitution of Illinois herein relied upon, and by municipal ordinances and condemnation proceedings which are described by the complaint. The plaintiffs are beneficiaries of that trust.

Hall v. *State of Wisconsin*, 103 U. S. 5 at 11.

Richmond v. *Irons*, 121 U. S. 27, 55, 56.

Pulsifer v. *Greene*, 96 Maine 438 at 445.

Burnett v. *West Madison State Bank*, 375 Ill. 402, 406.

People v. *Village of Glencoe*, 372 Ill. 280, 282.

Altschuler v. *Chicago City Bank and Trust Company*, 380 Ill. 137.

D-7) The pleading for plaintiffs in this record, shows that the defendants as such trustees, have assembled and hold designated trust funds, which are applicable so far as they extend to the liquidation of the purchase money award due from the defendants to the plaintiffs, who are beneficial owners of all funds which are described and brought into court by this record.

Petition for Mandamus, Tr. pages 1-5.

Complaint in Chancery, Tr. pages 15 ff.

D-8) In deference to the constitution as asserted by this suit, and the duties of defendants as trustees, every court of equity will disregard all demands for deeds and documents of purported release, made by defendants upon partial payment, (namely, payment after substantial delay, of only a sum at most equal to the amount of the judgment award as entered), and will disregard all such deeds and purported releases so obtained by defendants.

White v. *Sherman,* 168 Ill. 589 at 605, 610.

American etc. v. *City of Avon Park,* 311 U. S. 138 at 145.

Wood v. *Lovett,* 313 U. S. 362 at 371.

Hatch v. *Hatch,* 9 Ves. Jun. 292.

Ingram v. *Lewis,* 37 Fed. (2d) 259 at 263.

In Re Umrich, 190 N. Y. S. 187.

Dinwiddie v. *Self,* 145 Ill. 290 at 292.

Ill. Merchants Trust Co. v. *Harvey,* 335 Ill. 284, 289.

Peter v. *Peter,* 343 Ill. 493 at 500.

Rudin v. *City of Harvey,* 377 Ill. 595.

Northwestern Yeast Co. v. *City of Chicago,* 301 Ill. App. 303, 309.

Fry v. *Pence,* 261 Ill. App. 218, 232 and 239-240.

Slade v. *Slade,* 310 Ill. App. 77, 82, 86-89.

McKeon v. *Pridmore,* 310 Ill. App. 634, 647.

Shirley v. *Ellis Drier Co.,* 310 Ill. App. 518.

City of Chicago v. *Empire Liquidating Corporation,* 370 Ill. 631, 19 N. E. (2d) 576.

Sands v. *Sands,* 112 Ill. 225 at 231.

Restatement of Trusts, Section 217, (b-c-e).

Bogert on Trusts, Section 493.

Scott on Trusts, Section 343.

D-9) In violation of both State and Federal Constitutions, by their conduct after condemnation judgment, and manner of defense to this suit, the defendants seek to accomplish direct impairment and departure from said trust relationship with your plaintiffs, arising under condemnation proceedings for purchase of real estate.

Constitution of Illinois, Art. 2, Section 14.
Article I, Section 10 and the Fourteenth Amendment to Constitution of the United States.
Hyslop v. *Finch*, 99 Ill. 171.
Murray v. *Village of Skokie*, 379 Ill. 112.
Friedman v. *City of Chicago*, 374 Ill. 545.
Wall v. *Chicago Park District*, 378 Ill. 81 at 93.
Kinney v. *Lindgren*, 373 Ill. 415.
Roach v. *Village of Winnetka*, 366 Ill. 578.

This record presents a proper class suit in chancery.

D-10) The named plaintiffs have the right to file this class suit on behalf of themselves and all other persons in like situation. The named plaintiffs are members of that class of persons who own the trust fund in common in equity and have rights and interests in common.

Flanagan and others v. *City of Chicago and others*, 311 Ill. App. 135, 157-160 (leave to appeal denied).
Supreme Tribe of Ben Hur v. *Cauble*, 255 U. S. 356, 363.
Boesenberg v. *Chicago Title & Title Co.*, 128 Fed. (2d) 245, 246.
Haraway v. *Zambie*, 157 S. W. 2d 504.
Hillmer v. *Chicago Bank of Commerce*, 375 Ill. 266 at 268.
Richmond v. *Irons*, 121 U. S. 27 at 44, 51.
39 American Jurisprudence 917, parties section 44 ff.

D-11) The court of chancery has inherent and original control over all trust matters.

These are Illinois Supreme Court decisions:

Cummings v. *Smith,* 368 Ill. 94 at 104, 105.

Norton v. *Hixon,* 25 Ill. 371, 373.

Mettler v. *Warner,* 249 Ill. 341 at 347.

Moore v. *Gar Creek Drainage District,* 266 Ill. 399 at 403.

Springer v. *City of Chicago,* 308 Ill. 356 at 365.

Highway Commissioners of Town of Pennsylvania v. *Durham,* 43 Ill. 86.

Davis v. *City of Chicago,* 333 Ill. 422 at 426.

These are Circuit Court of Appeals decisions:

The Maccabees v. *City of North Chicago,* 125 F. (2d) 330 at 333-334 (C.C.A. 7).

Paul v. *Girard Trust Company,* 124 Fed. (2d) 809 (C.C.A. 7).

Natural Gas Pipeline Company v. *Federal Power Commission,* (C.C.A. 7), 128 Fed. (2d) 481 at 487.

City of Jacksonville v. *Bankers Life Company,* 90 Fed. (2d) 141.

These are cases from other courts:

East Sudbury v. *Belknap,* 18 Mass. 512.

Woodruff v. *State,* 77 Miss. 68.

Attorney General v. *City of Dublin,* 1 Bligh N.R. 312.

D-12) By force of constitutional provision, the chancery powers of Circuit Courts cannot be abridged nor limited by the General Assembly. The condemnation purchase price is a trust res which the Circuit Court has inherent and original power to enforce and to administer in chancery.

Illinois State Constitution, Article VI, paragraph 12.

Howell v. *Moores*, 127 Ill. 67 at 79.

People v. *Smith*, 374 Ill. 286.

Flanagan v. *City of Chicago*, 311 Ill. App. 135.

Rothschild v. *Village of Calumet Park*, 350 Ill. 330 at 338.

Getz v. *City of Harvey*, 118 Fed. (2d) 817.

Hart v. *Central City*, 159 S. W. (2d) 18.

Siefker v. *City of Chicago Heights*, 297 Ill. App. 113 at 117, and cases there cited.

Mruk v. *Mruk*, 379 Ill. 394.

D-13) No statute of limitations is a bar to the claim made by petition for mandamus and by the complaint in chancery in this record. No statute of limitations can begin to run against any fiduciary or trustee, until there has been an unqualified refusal by the trustee to pay the beneficiary: Or until the municipality as trustee, gives notice that it has money in its treasury available to pay the claim with interest to date announced for payment.

Shepard v. *People*, 200 Ill. 508.

Markman v. *Calumet City*, 297 Ill. App. 531, 542.

Bonham v. *People*, 102 Ill. 434, 439.

Fyffe v. *Fyffe*, 292 Ill. App. 539, 550.

Reynolds v. *Sumner*, 126 Ill. 58, 71.

C. & E. I. Ry. v. *Hay*, 119 Ill. 493, 502.

Amy v. *City of Galena*, 7 Fed. 163.

State v. *Ferrell*, 70 P. (2d) 290, 292.

Lewis v. *Hawkins*, 90 U. S. 119 at 126.

D-14) No statute of limitations has become operative against any claim made on behalf of any plaintiff by this record.

Kane v. *City of Charleston,* 161 Ill. 179.

People ex rel. 1111 North LaSalle Building Corporation v. *City of Chicago,* 316 Ill. App. 66.

Bourland v. *Peoria County,* 16 Ill. 538, 546.

Dietrick v. *Greaney,* 309 U. S. 190 at 196.

City of New Orleans v. *Warner,* 175 U. S. 120 at 130.

14 Pomeroy Equity Jurisprudence 1941, 5th Ed. Sec. 1250.

People ex rel. Northup v. *City Council of Chicago,* 308 Ill. App. 284, 296.

Book v. *Eubank,* 311 Ill. App. 312, 319.

Roberts v. *Village of Lyons,* 307 Ill. App. 36, 39.

The Maccabees v. *City of North Chicago,* (C.C.A. 7) 125 Fed. (2d) 330 at 334.

Shepard v. *The People,* 200 Ill. 508.

Hood v. *Commonwealth Trust and Savings Bank,* 376 Ill. 413 at 416, 34 N. E. (2d) 414, 418.

D-15) The claims for plaintiffs made by this suit are not barred by laches.

Finn v. *Wetmore,* 212 Ill. App. 550 at 553.

Chicago & E. I. Ry. Co. v. *Hay,* 119 Ill. 493 at 496.

City of Chicago v. *McCluer,* 339 Ill. 610 at 621.

Puterbaugh Chancery Pleading and Practice, Vol. I, Seventh Edition at page 242, section 159.

People v. *City of Peoria,* 374 Ill. 313 at 322.

Wall v. *Chicago Park District,* 378 Ill. 81 at 95.

McKeon v. *Pridmore,* 310 Ill. App. 634.

Metcalf v. *Bank of Pittsfield,* 312 Ill. App. 385.

Paul v. *Girard Trust Co.,* 124 Fed. (2d) 809 at 813.

Lewin on Trusts, 14 Edition 1939, page 839 ff.

D-16) Plaintiffs should have restoration for all trust money and funds misapplied by the defendants for any purposes not within the language of this trust.

Fichter v. *Milk Wagon Drivers Union*, 382 Ill. 91.
3105 Grand Corporation et als. v. *City of New York, et al.*, 42 N. E. (2d) 475; 288 N. Y. 178.
Lucas v. *Lamb*, 156 S. W. (2d) 634.
Haraway et als. v. *Zambie et als.*, 157 S. W. (2d) 504.
Town of Aurora v. *C. B. & Q. Ry. Co.*, 119 Ill. 246.

Conclusion for Relief.

Your petitioners submit that they did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Supreme Court of Illinois was such as to call for review and reversal by the Supreme Court of the United States.

WHEREFORE, petitioners pray the allowance of a writ of certiorari to the Supreme Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein by said Supreme Court of Illinois may be reversed, and for such relief as this Court may direct.

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Attorney for Petitioners.

BENJAMIN F. LANGWORTHY,
LAWRENCE C. MILLS,
HORACE RUSSELL,
Of Counsel.

(30)

FILED
JUN 28 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 1078 90

THE TRUST COMPANY OF CHICAGO, Administrator of the Estate of Elizabeth Palmer Smith, Deceased, et al.,

Petitioners,

vs.

CITY OF CHICAGO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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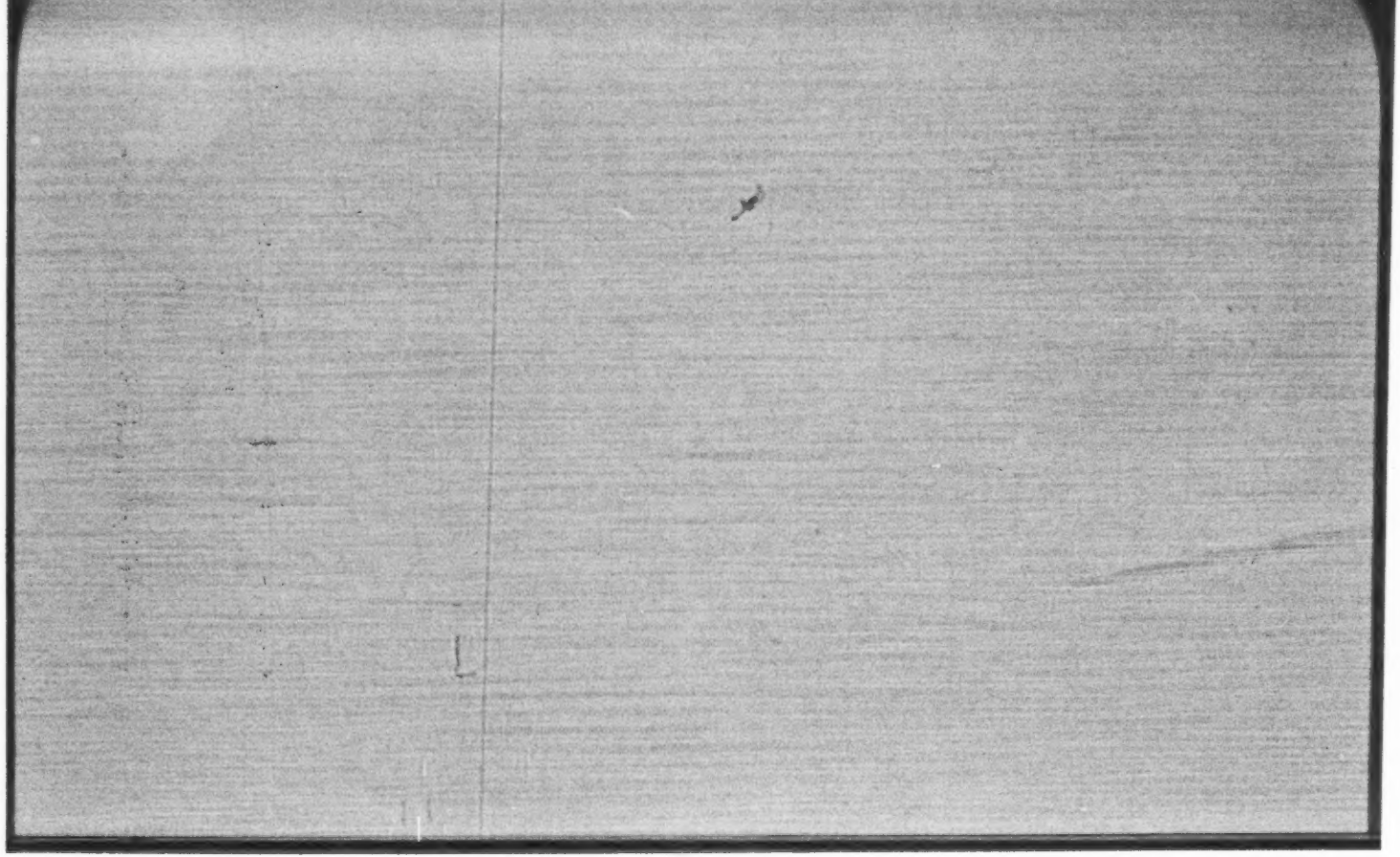

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The respondents, City of Chicago, et al., oppose the petition for certiorari on the following grounds:

I.

The order of the Supreme Court of Illinois, transferring the case to the Appellate Court of Illinois, is not a final judgment that can be reviewed under Section 237 of the Judicial Code.

The decisions of this Court are so conclusive that the order sought to be reviewed is interlocutory in nature, that we consider that it would be an imposition upon the Court to meet the petition for certiorari on the merits. We shall confine ourselves to pointing out that this Court by its former decisions has established that it has no jurisdiction to entertain a petition for certiorari under the circumstances of this case.

The trial court sustained a demurrer to the complaint and dismissed the suit (Tr. 56). The plaintiffs filed their Notice of Appeal to the Supreme Court of Illinois, which is the court of last resort in that state (Tr. 57). On January 20, 1943, the Supreme Court of Illinois entered the following order (Tr. 61-62):

> "And now on this day the Court having diligently examined and inspected the record and proceedings aforesaid as well as the briefs and argument filed herein, and oral argument by counsel, and now being fully advised in the premises, is of the opinion, find and adjudge that this case was wrongfully appealed to this Court.
>
> "Therefore, it is ordered by the Court that this case be and the same is hereby transferred to the Appellate Court of the First District of the State of Illinois, and the Clerk of this Court is directed to transmit the transcript and files herein with the order of this transfer to the clerk of said Appellate Court.
>
> "And it is further ordered by the Court that the said appellees recover of and from the said appel-

lants costs by them in this behalf expended, to be taxed in due course of administration."

A motion for reconsideration of this order was filed by plaintiffs (Tr. 67-78), which motion was denied on March 9, 1943 (Tr. 78-79).

The petition for certiorari seeks a review of this order transferring the case to the Appellate Court of Illinois. (Petition for certiorari, pp. 1, 3.) The Appellate Court of Illinois is a court of intermediate review and the case has not yet been considered or determined by it in pursuance of the order of transference.

In a situation almost identical to that in the case at bar, so far as procedural aspects are concerned, this Court held that an order of a court of last resort transferring a case to an intermediate appellate court is not final and is not reviewable by this Court.

In *Prudential Insurance Co.* v. *Cheek,* 252 U. S. 567, the Court dismissed for want of jurisdiction a Writ of Error to the Supreme Court of Missouri on the ground that the order of that Court transferring the case to the St. Louis Court of Appeals was not final. Cited in support of the dismissal were *Schlosser* v. *Hemphill,* 198 U. S. 173, 175; *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana,* 226 U. S. 99, 101; *Grays Harbor Co.* v. *Coats-Fordney Co.,* 243 U. S. 251, 255 and *Bruce* v. *Tobin,* 245 U. S. 18, 19. These cases all announce the rule that only final judgments of State Courts are reviewable under Section 237 of the Judicial Code and that the form of the order determines its finality.

A full history of the litigation in *Prudential Insurance Co.* v. *Cheek* is contained in a subsequent report of that case in 259 U. S. 530. The trial court had sustained a demurrer to the petition. Plaintiff declined to plead fur-

ther and appealed to the Supreme Court of the State. That court reversed the judgment and remanded the case for trial.

The ensuing proceedings are described by this Court in 259 U. S. at page 533:

> "* * * the case went to trial and resulted in a verdict in favor of plaintiff upon both counts. Defendant having reserved its constitutional points, appealed from the resulting judgment to the Supreme Court, which, however, refused to take jurisdiction on the ground that all constitutional questions had been decided on the former appeal and that the verdict, being for only $1500, was less than the jurisdictional amount required by statute; and hence transferred the cause to the St. Louis Court of Appeals for final disposition. 209 S. W. 928. Defendant, treating this decision as a final judgment reviewable by writ of error from this court, sued out such a writ, *and upon the ground that the judgment was not final under the state law the cause was dismissed March 8, 1920.* 252 U. S. 567. Thereafter it was submitted to the St. Louis Court of Appeals, which in conformity to the former opinion of the Supreme Court affirmed the judgment (223 S. W. 754), overruled a motion for rehearing and refused an application for certification of the case to the Supreme Court. A writ of error to the St. Louis Court of Appeals followed, under Section 237, Judicial Code, as amended by Act of September 6, 1916, c. 448, 39 Stat. 726." (Italics supplied.)

In view of the foregoing there can be no question that petitioners are prematurely seeking a review of the case by this Court. It is clear that they must first obtain a decision from the Appellate Court of Illinois. That court then has the power to grant a certificate of importance and an appeal to the Illinois Supreme Court. (Section 75, Illinois Civil Practice Act, Ill. Rev. Stats., 1941, chap. 110, par. 199.) If such appeal be granted the Supreme Court will undertake to determine the case and its decision will

then be final and reviewable (assuming affirmance of the trial court's judgment). If an appeal should be denied by the Appellate Court, the losing party has the right to petition the Supreme Court for leave to appeal. (Section 75, Illinois Civil Practice Act, Ill. Rev. Stats., 1941, chap. 110, par. 199.) If the petition for leave to appeal is allowed, the Supreme Court will undertake to decide the case and its decision will then be final and reviewable (assuming affirmance of the trial court's judgment.) If the Appellate Court should affirm the trial court, and refuse to grant an appeal to the Supreme Court and if the Supreme Court should deny leave to appeal (which is tantamount to the situation in *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 230) then the decision of the Appellate Court will be final and reviewable.

At the present stage in the proceedings there is no final judgment "by the highest court of a State in which a decision could be had" and consequently the petition for certiorari has been improvidently filed.

Conclusion.

For the foregoing reasons it is respectfully suggested that the petition for certiorari be dismissed or denied.

Respectfully submitted,

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Corporation Counsel of the
City of Chicago,
Attorney for Respondents.

J. HERZL SEGAL,
Assistant Corporation Counsel,
Of Counsel.

LIST OF AUTHORITIES.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 1078

THE TRUST COMPANY OF CHICAGO, ADMINISTRATOR OF THE ESTATE OF ELIZABETH PALMER SMITH, DECEASED, ET AL.,

Petitioners,

vs.

CITY OF CHICAGO, ET AL.,

Respondents.

REPLY BY PETITIONERS TO DEFENSE "BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI."

This court recently in the case of *Department of Banking of the State of Nebraska* v. *Pink, Superintendent of Insurance of the State of New York,* 317 U. S. 264 at 266, has passed upon the exact point of jurisdiction which is sought to be raised at bar by the Respondents. You ruled against the contention now made by Respondents. In refusing to take jurisdiction you there discussed the basis for refusal of jurisdiction in the case of *Bunn* v. *City of Atlanta,* 19 S.E. (2d) 553, 317 U. S. 666 and rehearing denied 317 U. S. 711. In that case the Peti-

titioners did what the Respondents say should be done in this case. In that case the review before an intermediate Appellate Court was pursued before coming to this court. This court there calculated the three months from the date of the prior order of transfer by the Supreme Court of Georgia to the intermediate Court of Appeals of Georgia. You said it was too late to bring to this court the constitutional and federal questions, after the intermediate Court of Appeals had passed upon other phases of the case. In the case at bar as in that case the intermediate Court of Appeals had no jurisdiction to pass upon the federal questions that were presented to this court for review. As to federal jurisdiction you ruled that the order by the Supreme Court of Georgia declining to exercise jurisdiction and directing a transfer, is final for purposes of calculating the time to seek review before this court. Compare *Mattoon Steamboat Co.* v. *Murphy,* 63 S. Ct. 1126 at 1128, 318 U. S. .....

In the case cited by Respondents (*Prudential Insurance Co.* v. *Cheek,* 259 U. S. 540), there was a situation which does not exist in the record at bar. The Supreme Court of Missouri sits normally in two divisions. Only upon special motion is there a court *en banc.* In the *Prudential* case the record does not show that such a motion was made. This court has ruled that it has jurisdiction to review only from the court *en banc* in Missouri; *Osment* v. *Pitcairn, et al., Receivers,* 317 U. S. 587, 63 S. Ct. 21 denying certiorari for 159 S.W. (2d) 666. Consequently the order of transfer in that *Prudential* case made by one division of the Supreme Court of Missouri, was not a final order within the meaning of the federal statute, because it was not made by that court *en banc.* For that reason the language quoted by respondents from that opinion at page 2 of their brief may be correct statement under the Missouri Practice.

But in Illinois the Supreme Court is a unit. It never sits in divisions. It is the highest court in that State.

It seems to your petitioners that it is an additional breach of trust and is unconscionable misconduct, for the respondents who are trustees of these funds, to seek as they have to push around your petitioners from court to court, and wear out the litigation by a process of attrition and manufactured complexity. Your petitioners believe that it is a misuse of public funds for the respondents to use their powers and their prestige, to oppress citizens who must advance their own private funds in an effort to compel accounting for trusteeship, which there was duty voluntarily assumed by respondents, to have been performed by them willingly and promptly a long time ago.

By such dilatory means shown by the record and financed by public taxes, the respondents have lulled the courts in Illinois to evasion of the obligatory powers and duties of said courts, and to denial of the constitutional rights of your petitioners, as shown by the motion before the Supreme Court of Illinois (Tr. 65-78), and the statement of grounds relied upon in the petition (pages 3, 7 and 19-25). Unless the basic federal and constitutional questions are first determined, and issues of fact as to an accounting are made up by proper pleadings, how could the Appellate Court of Illinois (which has no power to pass upon such federal questions) perform any judicial duty to this record? That it could not and ought not be asked to do so, is clearly shown by the recent cases in Illinois, where the Supreme Court of that State performed its obligatory duty by deciding the questions over which it had exclusive power for review, and by its opinion remitted other questions in the case to the intermediate Appellate Court. It is also shown by decisions of the intermediate Appellate Court, after an order of transfer,

passing by and not deciding the federal and constitutional questions. *People ex rel. 1111 North LaSalle Corporation* v. *City of Chicago,* 316 Ill. App. 66 and 43 N. E. (2d) 691.

Unless the federal and constitutional questions are reviewed by this court at this time, the injustice of a procedural ambush will be accomplished, by the respondents against the petitioners.

It follows that the ruling by this court, in *Department of Banking of Nebraska* v. *Pink, etc.,* 317 U.S. 264 at 266 above cited, governs and sustains this petition for review. The order brought here for review by this record, is final so far as federal and constitutional questions are concerned. Petitioners have followed the latest announcement by this court. They confirm the showing made at pages 3 and 25 of their petition. Your Petitioners urge that the petition should be allowed and the writ should be granted.

Respectfully submitted,

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